United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4075

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

SO CHAN,

Petitioner,

Docket
No.76-4075

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

STEVEN S. MUKAMAL
Counsel for Petitioner
Barst & Mukamal
127 John Street
New York, New York 10038
212 952-0700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SO CHAN,

Petitioner,

Docket No.76-4075

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ISSUE PRESENTED

WHETHER RESPONDENT'S DENIAL OF SUSPENSION OF DEPORTATION WAS ARBITRARY AND AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

This is a petition brought to review a final order of deportation entered by respondent, Immigration and Naturalization Service (hereinafter the 'Service') on February 5, 1976.

Jurisdiction of this Court is invoked under 8 U.S.C. 1105(a).

In an opinion dated September 8, 1975 an Immigration Judge denied So Chan's application for suspension of deportation made pursuant to 8 U.S.C. 1254(a)(1). An order of deportation was entered and the privilege of voluntary departure was granted in lieu of deportation.

The order of the Immigration Judge was affirmed on February 5, 1976 by the Board of Immigration Appeals.

This petition for review was filed with this Court on March 16, 1976.

STATEMENT OF FACTS

Petitioner, So Chan, is a 60 year old native of China and citizen of the Republic of China. He entered the United States as a crewman at Houston, Texas, on or about August 24, 1962.

So Chan was ordered deported from the United States as a person overstaying his authority to remain in October 1962, but was granted voluntary departure to June 1966.

Mr. Chan lived freely in the United States up until June 1975, at which time the Service re-opened deportation proceedings, which had been concluded some thirteen years earlier, and permitted So Chan to apply for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1).

Mr. Chan has worked in the United States as a waiter and since July 1970 has been continuously employed by the Fung Hee Restaurant located in Patterson, New Jersey.

Over the years, through a combination of thrift and industriousness, So Chan has been able to invest $8,000.00 in the Fung Hee Restaurant where he was employed. He is currently the owner of more than 10% of the outstanding shares of this enterprise.

Further, So Chan has been in substantial compliance with the federal tax laws of the United States and has consistently filed income tax returns for the past thirteen years.

Mr. Chan's financial responsibility and moral character are further demonstrated by the fact that he has supported his wife and daughter, both of whom are presently in the United States and has given his son, who has recently graduated from the University of Minnesota, upwards of $1,000.00 per year to help defray the cost of his college education.

At the hearing below, Mr. Chan gave uncontradicted testimony that his investment in the Fung Hee Restaurant would be adversely affected should he be forced to leave the United States.

Also, Mr. Chan's age must be taken into account in terms of his eligibility for relief under 8 U.S.C. 1254(a)(1). At 60 years old, it is unlikely that Mr. Chan would be able to find employment in the Republic of China and this would result in an extreme hardship to himself as well as his family.

SUMMARY OF ARGUMENT

Respondent's denial of suspension of deportation was arbitrary and an abuse of discretion.

Petitioner, So Chan, is statutorily eligible for discretionary relief and his case presents substantial equities which in line with Congressional intent and under administrative precedent, warrants a finding of "extreme hardship" and merit a favorable exercise of discretion.

ARGUMENT

RESPONDENT'S DENIAL OF SUSPENSION OF DEPORTATION WAS ARBITRARY AND AN ABUSE OF DISCRETION

A. PETITIONER IS STATUTORILY ELIGIBLE FOR DISCRETIONARY RELIEF.

The Attorney General, as provided in 8 U.S.C. 1254(a)(1), may suspend deportation and adjust an applicant's status to that of an alien lawfully admitted for permanent residence in the case of an alien who is, "deportable under any law of the United States . . . . has been physically present in the United States for a continuous period of not less than seven years . . . . and proves that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien . . . ."

So Chan was found to be statutorily eligible for the grant of discretionary relief by the Immigration Judge in his opinion dated September 8, 1975. In that opinion at page 4, the Immigration Judge said:

> "Assuming for the purpose of this decision that the respondent meets the minimum requirements for eligibility for suspension of deportation, nevertheless, as a matter of discretion that privilege should not be extended to him. Although he was given ample opportunity to depart voluntarily in

> connection with the prior hearing, he failed to do so, and when called upon to surrender for deportation, ignored this notice. Instead he deliberately evaded Service efforts to locate him until he was finally apprehended. In this manner he has managed to eke out his residence in this country to meet the physical presence requirement for suspension of deportation."

It is petitioner's contention that the Immigration Judge and the Board of Immigration Appeals erred when they rested their exercise of discretion on the fact that petitioner attained statutory eligibility by managing "to eke out" eligibility in violation of the Immigration Laws.

The foregoing decisional basis misconstrues the intent of Congress in regard to the enactment of 8 U.S.C. 1254(a)(1), the purpose of which was to provide humanitarian relief in cases of extreme hardship. Further, the Service's action fails to properly interpret existing administrative precedent with regard to the discretionary power vested in the Service by the statute.

The cases concerning the construction of 8 U.S.C. 1254(a)(1) are clear that a liberal interpretation of its provisions is essential to effectuating the intent of Congress and provide benevolent and humanitarian treatment to aliens, like the petitioner, who have met the statutorily established criteria of seven years continuous presence and good moral character. Wadman

v. Immigration and Naturalization Service, 329 F.2d 812 (9th Cir. 1964); Git Foo Wong v. Immigration and Naturalization Service, 358 F.2d 151 (9th Cir. 1966).

B. PETITIONER'S CASE MERITS A FINDING OF 'EXTREME HARDSHIP'.

The standard for establishing "extreme hardship" is broad and requires an analysis of each case in the context of its own facts and circumstances.

In Matter of Uy, 11 I.& N. 159, 161-162 (BIA 1965), the Board of Immigration Appeals stated:

> "Each case must be analyzed on the basis of the factual details present therein and each must be considered on its own merits in making a finding of exceptional hardship. The line which may separate a finding of extreme hardship may be at times close, but it is based upon a study of the circumstances of each case and the presence of substantial equities."

Factors that have been considered by the Board as relevant in determining the existence of substantial equities and a finding of extreme hardship to the alien include: length of residence in the United States; family ties; the possibility and/or financial burden of obtaining a visa abroad; and the health and age of the alien. see Matter of S, 5 I.& N. 409 (BIA 1953); Matter of U, 5 I.& N. 413 (BIA 1953); Matter of Louie, 10 I.& N. 223 (BIA 1963).

In Matter of S, supra, at 410, the Board stated that,

> "It is not necessary that all factors be existent in every case in order to find the necessary degree of hardship, but at least several factors should be present."

Petitioner respectfully submits that sufficient facts have been established in the record below to accord him relief under 8 U.S.C. 1254(a)(1).

So Chan is now 60 years old. Over the past thirteen years he has established himself as an independent, self-supporting individual. Further, he has shown himself to be both frugal and industrious as evidenced by the fact that he has been able to invest money in the restaurant in which he is employed as well as provide a modest amount of financial assistance towards his son's college education.

So Chan's equity interest in the Fung Hee Restaurant coupled with his long residence in the United States with the consequent effect of it now being very difficult to live abroad and re-establish himself at such a late time in his life, demonstrates the extreme hardship to which he would be subjected to if deported from the United States.

There is no question but that So Chan is a person of sound moral character and, in fact, a person, who by his own behavior, has shown himself to be a desirable resident of the

United States. This inference, when viewing the record as a whole, is inescapable. Cf. Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956).

C. EVASION, STANDING ALONG, IS AN INSUFFICIENT BASIS FOR AN UNFAVORABLE EXERCISE OF DISCRETION.

Petitioner submits that the administrative authorities denying the favorable exercise of discretion in cases arising under 8 U.S.C. 1254(a)(1) wherein evasion of the immigration laws of the United States was considered as a major factor for denying discretionary relief are substantially dissimilar and distinguishable.

In Matter of H C, 5 I.& N. 212(BIA 1953) the Board denied relief to a seaman who had no family ties and no equities whatsoever. In a case decided on the same day, the Board denied relief to a seaman who deserted his ship during World War II, notwithstanding efforts made by allied governments, including China and the United States, to prevent this activity during the crucial period of the war. Matter of L M, 5 I.& N. 214(BIA 1953); see also Matter of W Y L, 5 I.& N. 637(BIA 1954).

Finally, in Matter of C, 7 I.& N. 608(1957), the Board denied suspension of deportation to an alien who entered as a stowaway, was only 39 years old and had no family ties in the United States.

As previously stated herein, So Chan's family is presently in the United States, albeit out of status at the present time, and a great hardship would be worked on the entire family should So Chan be deported from the United States.

Further, So Chan's hard earned interest in the Fung Hee Restaurant would be lost should he be deported and his prospects of re-establishing himself abroad would be greatly diminished by the loss of this investment.

In view of the substantial equities in this case, a discretionary denial of relief based on evasion of the immigration laws runs counter to Congressional intent and administrative precedent.

CONCULSION

WHEREFORE, it is prayed that the decision of the Board of Immigration Appeals be reviewed and upon such review that it be reversed, and that petitioner, So Chan, be granted suspension of deportation and the status of an alien lawfully admitted for permanent residence in the United States.

Respectfully submitted,

STEVEN S. MUKAMAL
Counsel for Petitioner
Barst & Mukamal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SO CHAN,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Docket No. 76-4075

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

HARRY POLATSEK, being duly sworn, deposes and says:

1. That I am over 18 years of age and am not a party to this action.

2. That I reside at 82 Schermerhorn Street, Brooklyn, New York

3. That on May 18, 1976, I did personally serve 2 copies of petitioner's brief in the above captioned action upon counsel for respondent, Office of the United States Attorney for the Southern District of New York, located at 1 St. Andrew's Plaza, New York, N.Y. 10007.

Harry Polatsek
HARRY POLATSEK

Sworn to before me this
18th day of May 1976

Stephen Singer
NOTARY PUBLIC
STEPHEN SINGER
Notary Public State of New York
No. 30-9023418 Nassau County
Comm. Expires March 30, 1978